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FILED
ARIZONA COURT OF
APPEALS CIV 1645

IN THE

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ELIZABETH U. FRITZ
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Court of Appeals

The State of Arizona

DIVISION TWO

11439-2

FILED

CLERK SUPREME COURT
BY

FARMERS INVESTMENT
COMPANY, a corporation,

Appellant,

vs.

ANDREW L. BETTNY, as
State Land Commissioner
and THE STATE LAND
DEPARTMENT, a department
of the State of Arizona,
and PIMA MINING COMPANY,
a corporation,

Appellees.

No. 2 CA-CIV 1645

Pima County
Superior Court
116542

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PHOENIX, ARIZONA 85073

REPLY TO ANSWERING BRIEF OF THE STATE
LAND DEPARTMENT AND STATE LAND COMMISSIONER
OF THE STATE OF ARIZONA

(119)

FCTL002308

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FARMERS INVESTMENT COMPANY,)
a corporation,)
Appellant,)
vs.) Case No. 2 CA-CIV 1648
ANDREW L. PETTAY, as State)
Land Commissioner and THE)
STATE LAND DEPARTMENT, a) Pima County
department of the State of) Superior Court
Arizona, and PIMA MINING) No. 116342
COMPANY, a corporation,)
Appellees.)

PLAINTIFF'S MOTION

The usual abbreviations as to the abstract of Record and Briefs of the parties will be used. Appellant FARMERS INVESTMENT COMPANY, a corporation, will be referred to herein as "FICM"; Appellees ANDREW L. PETTAY as State Land Commissioner and THE STATE LAND DEPARTMENT, a department of the State of Arizona, will be collectively referred to

herein as "STATE LAND DEPARTMENT"; and
Appellee PIMA MINING COMPANY, a corporation,
will be referred to herein as "PIMA".

All emphases, unless otherwise indicated,
will have been ours.

* * *

REPLY TO ANSWERING BRIEFS OF THE STATE
LAND DEPARTMENT AND STATE LAND COMMISSIONER
OF THE STATE OF ARIZONA

GENERAL RESPONSE TO APPELLEES'
ANSWERING BRIEF

Appellees the State Land Department and The State Land Commissioner present three main arguments in their Answering Brief.

Appellees' first argument amounts to an assertion that no state action, even under its police power, which may adversely affect the revenue which might be gained from any exploration of state land funds, is unconstitutional.

This argument was not presented to the Court below and will not be further noticed here. Malan v. Milton, 110 Vt. 325, 42 A.2d 562 (1948). See also Malan v. National Bank, 113 Vt. 325, 43 A.2d 562 (1949).

While the theory behind this argument is fallacious, it carried to its logical conclusion, a block of state land in a residential area could be sold and used for a foundry "if the price was right".

The second argument tracks the reasoning

of the first argument. Its opening paragraph offers a new theory, at least it is the first time to our knowledge it has been asserted openly, rather than covertly and by indirection, as is sometimes done when the Court is advised of the great financial benefits or losses which will follow to the State if the Court adheres to the law. Appellees paraphrase that second argument:

"Assuming the sale of the trust product, water, is illegal, does the large revenues resulting from the sale of water justify the State Land Department's disposition of the product?"

(See, infra)

The question scarcely deserves even a pro forma answer and rejection. In passing, it is interesting to note that Appellees seem to consider 1 cent per 1,000 gallons (or approximately \$3.25 per acre foot) for clean, potable groundwater quite a bonanza to the State of Arizona. It may be a bonanza, but it certainly does not result in a bonanza to

the State.

In their third argument, Appellees seek to justify execution of "commercial leases" 907-01 and 907-02 for use by Pima as a tailing waste dump.

First, however, they again repeat Pima's oft-repeated cry that the issue was not raised below.

The record is directly to the contrary.

Pima, in its Motion for Summary Judgment, justified its use of critical groundwater area water outside of the Submittant Environmental Critical Groundwater Area ("Critical Area") by making affidavits that the use was to provide the liquifying agent which would permit its tailing wastes to flow by gravity to its tailing ponds, thereby putting to use Pima's commercial leases, which it had obtained from the State Land Department for the "commercial" storage of tailing wastes for a 10-year period.

Pima brought commercial leases numbered

907-01 and 907-02 into these proceedings by its affirmative tender of the fact thereof as justifying their water use.

To assert that these leases were not before the trial Court and the use of this State Land by Pima as a tailing waste dump as not within the issues presented by Pima's Motion, is to deny the record.

In attempting to justify these leases, Appellees assert that the leases will yield the full appraisal value of the land over the term of the leases.

We assume Appellees thereby impliedly concede that, in effect, the State Land Department has sold this land to Pima. This raises some interesting questions:

1. Is the purchase price paid as rental over a 10-year period interest-free for that period?
2. Are these two valuable sections assessed to Pima for real property

taxation?

3. Who will keep down the blowing tailing dust and otherwise protect the Upper Santa Cruz Valley from the resulting nuisance if these tailing ponds are not zealously protected?

4. What about the taxes upon the property after the leases expire? Does Pina obtain a permanent storage area for the price of a 10-year lease?

5. Has the same type of appraisal made as to the value of these lands as was applied in determining the value of the water which Pina has been receiving under its Connerical Lease No. 906?

The short answer to the contention made is that Appellees, including Pina, or not accomplish by indirection that which is expressly forbidden to be done directly. Farley Investment Co. v. Pina Mining Co., ___ Ariz. ___ (1974) (Cause No. 11439).

In conclusion, Appellees, even though they have in their Arguments I, II and III, recognized that issues were dealt with by the trial Judge in addition to Commercial Lease No. 906, and have urged affirmation of their interpretation of the law, nonetheless take up Pima's position that the case is moot.

They again argue that TTGO has gained all it sought by Count Four of its Amended Complaint, wholly ignoring that Pima also got all it sought by its Motion for Summary Judgment, but now has no stomach for appellate review of the issues, most of it for appellate review of the issues it injected into the trial Court's determination of the Count Four controversy.

There is no denying the fact that Count Four alleged Pima's water use was illegal and contrary to Arizona Water Law (App.Op.Br. 5, 6).

There is no escape from the fact that Pima attempted to secure an adjudication that

its manner and purpose of use of the water in controversy was legal, by the Affidavit it filed supporting its claims.

FICO is not here seeking more relief, but endeavoring to secure appellate review of the relief sought and which undoubtedly would have been claimed as won by Pima, had the occasion presented itself.

CONCLUSION

As a matter of law, unless the rationale of Bristol v. Cheatham, 75 Ariz. 227, 255 P.2d 175, is to be rejected, any use away from the land producing groundwater is an unreasonable use, if thereby an adjoining landowner's water supply is damaged. Water Taxes v. State Land Department, 104 Ariz. 527, 465 P.2d 385 and Idem, 106 Ariz. 306, 479 P.2d 169, any new use of groundwater of a site designated Critical Groundwater Area and subsequent to such designation, results as a matter of law in damage to existing users. By its own admissions, Pima's water use is, as a matter of law, illegal.

Reasonable use relates only to the question of how the water is used on the lands producing the water. It does not provide a formula for determining if a use made away

from the land is permissible because it is
a "Reasonable use".

Respectfully Submitted,

SNELL & WILMER

Hank Miller by JHC
Mark Miller

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Attorneys for Appellant

State of Arizona)
County of Maricopa) ss

Loren W. Ceunce, being first duly sworn,
deposes and says:

Affiant mailed two copies of Appellant's
Reply to Answering Brief of the State Land
Department and State Land Commissioner of the
State of Arizona, to:

N. WARNER LEE, Attorney General of
the State of Arizona
Attorney for Appellees ANDREW L. BETTS
and THE STATE LAND DEPARTMENT

and copies to:

VERITY & SMITH and MISTICK, PEELER & GARRETT,
Attorneys for Appellee PIMA MINING COMPANY
properly addressed and postage prepaid, on
August 9th, 1974.

Loren W. Ceunce
Affiant

SUBSCRIBED and sworn to before me this
9th day of August, 1974.

My commission expires:

Notary Public - State of Arizona - Sept 1978

STATE OF ARIZONA)
)
COUNTY OF MARICOPA) ss:

I _____ Craig Swick hereby certify:

Name

That I am _____ Reference Librarian, Law & Research Library Division _____ of the Arizona State
Title/Division

Library, Archives and Public Records of the State of Arizona;

That there is on file in said Agency the following:

Microfilm of Farmer's Investment Company v. Pima Mining Company et al, Arizona Supreme Court Case No. 11439-2, Reply to Answering Brief of the State Land Department and State Land Commissioner of the State of Arizona in Farmers Investment Company v. Bettwy, filed September 23, 1974. Court of Appeals Instruments (Part Two) Page 119 with 14 Pages of the Brief following.

The reproduction(s) to which this affidavit is attached is/are a true and correct copy of the document(s) on file.

Craig B. Swick
Signature

Subscribed and sworn to before me this

12/14/2005
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009.

Date

